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Supreme Court of the United States

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BRIEF FOR NORTHERN SECURITIES COMPANY, RESPONDENT.

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Supreme Court of the United States,

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,
Complainants-Petitioners,

vs.

NORTHERN SECURITIES COMPANY,
Defendant-Respondent.

BRIEF FOR NORTHERN SECURITIES COMPANY, RESPONDENT.

This suit is here on writ of *certiorari* issued to the Circuit Court of Appeals of the Third Circuit, upon the petition of Harriman and others, complainants. When the writ was issued, that Court had given its opinion and made a decree that the order of the Circuit Court from which the Northern Securities Company, defendant, had appealed, be reversed.

The order appealed from enjoined this Company, *pendente lite*, from disposing of certain stock of the Northern Pacific Railway Company, which it is the purpose of the suit to recover by final decree. The injunction was granted by the Circuit Court, with-

out deciding whether the complainants were entitled to such final relief, upon the ground that that question should await the final hearing after proofs taken, and upon the further ground that an appeal would lie if the injunction were granted, but not if it were denied.

Manifestly the first of these grounds was insufficient, unless there were issues of fact arising upon the pleadings and stipulations which *must be* determined in order to decide the question, whether the complainants were entitled to the final relief sought. It is submitted that there were and are no such issues. There may be issues of fact bearing upon the extent of the relief to which the complainants are entitled, if their theory of right be accepted; but there are none, we submit, which must be determined in order to decide that their theory of right is not well founded, or, in other words, that they are entitled to no final relief whatever.

By the admission of counsel in the Circuit Court, complainants' theory of right rests wholly on the proposition that the Securities Company never acquired title to the Northern Pacific stock which the complainants seek to recover. That this proposition is unsound, is a conclusion flowing from facts about which there is no dispute. Facts not admitted may add strength to this conclusion, but without them, we submit, the conclusion is clear.

The leading, if not the only, theory in support of the complainants' contention—that the Securities Company never acquired the stock—is that this is the effect of the decrees in the suit of the United States against this Company and others. The decrees, the opinions and the record in that suit were before the Court. Everything needed to determine the effect of the decrees was presented complete and undisputed. The taking of proofs cannot possibly add anything in this respect. So far as the suit rests upon this theory the court never can be more fully advised of the material facts upon which the complainants rely, than it is by the present record.

The injunction *pendente lite* can be justified only upon the theory that it is a necessary incident to the granting of such final relief as the complainants *appear* to be entitled to ; in other words, that the complainants *appear* to be entitled to a decree that the Northern Pacific stock which they claim, or some of it, be delivered to them, a decree which cannot be enforced if this stock shall have been disposed of. The right to such final relief must *appear ;* if not, the injunction was error. If such right did not *appear*, the question of granting or denying the injunction was not addressed to the discretion of the court. Certainty was not required ; nor, perhaps, the same confident conclusion as upon final hearing ; but nevertheless, to justify the injunction, it must have *appeared* to the court that the complainants were entitled to such final relief. All the material facts being before the court, complete and undisputed, the question was presented precisely as at final hearing. That question does not seem to us a difficult one; but though it were, the court was bound to answer it, finding the complainants entitled to the final relief, or else to refuse the injunction. However unusual or difficult any question may be, if it must be passed upon in determining whether the complainants are entitled to final relief, the court may not put that question aside, and, assuming that it may possibly be answered in favor of the complainants, grant such temporary relief as is allowable only if what it assumes really *appears.* If, upon the record, it does not *appear* that the complainants are entitled to recover this stock the order appealed from was erroneous and should be reversed.

Brooklyn Club vs. McGuire, 116 Fed., 783.
Home Ins. Co. vs. Nobles, 63 Fed., 643.
Central Stock Yards Co. vs. L. & N. R. R. Co., 112 Fed., 823, 828.
Stevens vs. M., K. & T. Ry. Co., 106 Fed., 771, 774.
Amelia Milling Co. vs. Tennessee C. I. & R. Co., 123 Fed., 811.

In some cases "a probable right" is deemed enough. (New Memphis Gas Co. vs. Memphis, 72 Fed., 952; Indianapolis Gas Co. vs. Indianapolis, 82 Fed., 245; Sanitary Reduction Works vs. California Co., 94 Fed., 694; Georgia vs. Brailsford, 2 Dallas, 402); or a "*prima facie* right" Charles vs. City of Marion, 98 Fed., 166).

See, also, Cosmos Exploration Co. vs. Grey Eagle Oil Co., 104 Fed., 20.

In Utah N. & C. R. R. Co. vs. Utah N. & C. Ry. Co., 110 Fed., 879, it is said that "in all cases *essential facts must be clearly proven* in order to put the power of the Court in motion and justify the issue of the writ."

There are cases seeming to hold that, even without a *prima facie* case appearing, an injunction may be granted to preserve the *status quo* until final hearing. Some of them do not really so hold. If there are any which do, it is submitted that they are contrary to sound reason and the weight of authority as well. In Allison vs. Corson, 88 Fed., 581, it is said: "If it is reasonably clear that he (moving party) cannot ultimately succeed—if his pleading discloses no cause of action or defense—no injunction should be granted." In Denver & R. G. R. R. Co. vs. U. S., 124 Fed., 156, the court found the evidence "strongly persuasive" of complainant's right. In Haddon vs. Dooley, 74 Fed., 429; Cartersville Light Co. vs. Cartersville, 114 Fed., 699, and Cohen vs. Delavina, 104 Fed., 946, a probable or *prima facie* case appeared. The facts in City of Newton vs. Levis, 79 Fed., 715, certainly gave rise to a presumption that the complainant was right.

But even if the Circuit Court be thought justified in holding the *status quo* to await the final hearing, or, in case of an appeal, to await the action of the Circuit Court of Appeals, the latter Court rightly followed the same course as in Western Union Telegraph Co. vs. Pennsylvania R. R. Co., 123 Fed., 33.

It is the approved practice on appeals from injunc-

tion orders, not only to consider the merits but to dismiss the bill, if the court can see that the complainant is not entitled to final decree.

Smith vs. Vulcan Iron Works, 165 U. S., 518.
Mast Co. vs. Stover Co., 177 U. S., 485.
Castner vs. Coffman, 178 U. S., 168.
Mayor of Knoxville vs. Africa, 77 Fed., 501.
Bissell Carpet Sweeper Co. vs. Goshen Co., 72 Fed., 545.

It is submitted, therefore, that, if the argument of the complainants still rests upon the theory of *res adjudicata*, so called, that is upon the effect of the decrees in the Government suit, or upon any other theory concerning which the facts are substantially undisputed, this Court, finding such theory unsound, will, not simply reverse the injunction order, but dismiss the bill.

Manifestly no other theory would be presented, if the complainants had not filed their second amended bill of complaint. In their reply brief in the Circuit Court counsel for complainants, after arguing that they might stand upon the decree in the Government suit, though they did not allege the facts therein found and were not parties, say that "*no departure from the case previously presented is made in the second amended bill.*"

It having been objected that, not being parties, they could not sue upon the decree, complainants set up as facts the facts found in the Government suit, and rely on the decision therein as controlling authority. Their contention that title to the stock did not pass, still rests on the proposition that that is the effect of the decree in the Government suit, or, in other words, that it was substantially so adjudged therein.

POINTS.

I.

It was not the legal effect of the decree in the Government suit that title to the stocks of the Northern Pacific Railway Company and the Great Northern Railway Company, which the Northern Securities Company now holds, never passed to the last-named company.

The legal theory of the complainants is shown in paragraph XIII. of the second amended bill of complaint (precisely as in the same paragraph of the amended bill) as follows :

> " XIII. Your orators are advised by counsel and therefore aver that *the effect* of said decree of April 9, 1903, as affirmed by the Supreme Court of the United States, was to adjudge that the Northern Securities Company was not a purchaser or owner, but simply a custodian of the shares of stock of said railway companies acquired and held by it as aforesaid, that it acquired and held possession thereof in violation of said Anti-Trust Act, that it acquired no title thereto and cannot transfer any rights in respect thereof, and that the legal and equitable owners of said shares of the stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company or their assigns."

On the other hand, we contend that by that decree the Securities Company was adjudged owner of this stock. Indeed it seems to us that this is the one thing upon which all the judges, in the Circuit Court and in

the Supreme Court, agreed. However they differed otherwise, they all, it seems to us, agreed that this Company owned the stock when the decree was made.

Let us examine first the decree itself.

It adjudges that the stock sought to be reached in this suit, as well as other stock of the two railway companies "*was acquired and is now held*" by the Securities Company. It adjudges that this was by virtue of an illegal combination or conspiracy. The how or why does not now concern us; but only the adjudication that as matter of fact this stock "was acquired and is now held" by the Company.

The decree enjoins the Securities Company from voting upon the stock, and in effect enjoins it from receiving dividends on account of it. Voting and receiving dividends are incidents of ownership. The inference of ownership in the Securities Company flows from these injunctions themselves. The Securities Company is not enjoined from selling or in any manner disposing of the stock; but simply from exercising two rights, incidental to ownership, the exercise of which the Court must have thought would involve a violation of the Anti-Trust Act; for the jurisdiction of the Court was only to *prevent* violations of the act. The Court in effect says: "We find that you have acquired and now hold this stock. But you must not vote upon it, or receive dividends upon it, because this, in our judgment, would be *using* the rights of ownership in violation of the law." In its petition the Government asked the Court, not simply to restrain the Securities Company in the use of the stock, but to declare void the transactions in which it was acquired, and compel its return. The court refused to go beyond restraining its *use*; its *disposition* was left untouched.

Then there is the paragraph of the decree which begins: "But nothing herein contained shall be construed as prohibiting," etc. The argument that the previous language by itself must have meant something which the Court here says it shall not be con-

strued to mean, is unsound. Such provisions are often found in writings of various kinds, inserted only from over-abundance of caution.. Manifestly, this paragraph was added merely to prevent any possible misunderstanding. But what is it that the Court states is not prohibited by its decree? Returning and *transferring* to the stockholders of the two Railway Companies (that is, of course, the former stockholders from whom it had been received) stock received *in exchange for* the stock of the Securities Company; or transferring and assigning such stock to persons now holders of its stock originally issued *in exchange or in payment for such stock* of the railway companies. Here again is recognition of the purchase; that the Securities Company had received the stock of the Railway Companies *in exchange for* its own stock; that its own stock had been issued *in exchange or in payment for* the stock of the railway companies; a further recognition of the present ownership of the latter stock by the Securities Company. But why did the Court so limit this statement? Probably because it thought that possibly wrong inferences might be drawn from its general finding as to the illegality of the scheme, affecting those who had participated therein and their assignees. These persons were the stockholders of the Railway Companies who were parties to the combination, and the present holders of stock issued to them. Other stock the Securities Company had got by purchase for cash or for stock from persons not charged with any wrongful intent. As to this stock and these persons, there was no thought of any possible misunderstanding.

As to the purpose of the Court, however, the Court itself has spoken, having in mind the suggestions of the complainants in line with their argument in this case. See the opinion rendered upon denial of the application of the complainants Harriman, Pierce and Oregon Short Line Railroad Company to intervene

in the Government suit after the affirmance of the decree by this Court. It is there said:

> "It [the Court] accordingly contented itself with an order which rendered the stock of the two Railway Companies, *so long as it remained in the hands of the Securities Company*, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. * * * When the decree was entered it was assumed by the Court that when the stock was thus rendered valueless *in the hands of the Securities Company*, the stockholders *of that Company* would be able and likewise disposed to make *some disposition* of the stock which, under all the circumstances of the case, would be fair and just and would restore it to the markets of the world, where it would have some value instead of being a worthless commodity. It was thought that the duty of thus *disposing of it* could safely be left to the stockholders *of the Securities Company*, and that if any controversy arose in the discharge of this *function*, in view of the situation *that had been created by the decree*, it would be a controversy that would properly form the subject matter of an independent suit between the parties interested."

And then as to this paragraph of the decree: "But nothing herein contained shall be construed," etc., it is said:

> "But this provision was merely permissive. It did not command that the stock should be returned *or exclude other methods of disposing of it* that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two Railway Companies in a manner some-

> what different from that which was tentatively suggested by the decree, but not commanded, cannot be regarded as a failure to obey the decree."

So this very Court held that the plan, since approved by the stockholders of the Securities Company, which the Directors of the Securities Company are seeking to carry out, was in no way inconsistent with its decree. And yet these complainants rely upon the *effect of the decree* to obstruct that same plan.

The decree of April 9, 1903, certainly did not in terms adjudicate anything as to the *disposition* of this stock as distinguished from its *use*. An implied adjudication is sought to be built upon this particular paragraph, upon a mere rule of construction of no great weight—and rules of construction never bind, but are only aids in reaching the intention—and the Court itself has declared that no such adjudication was intended; that they intended to leave the *disposition* of the stock, which because of the "situation that had been created by the decree" must be disposed of by the Securities Company, to the directors and stockholders *of that company*.

But further evidence against the complainants' theory is found in the opinion filed when the decree was made.

Judge THAYER says, that stockholders of the two Railway Companies "conceived the design of placing a very large majority of the stock of both of the last-named companies in the hands of a single *owner*;" that to this end they agreed to cause the formation of a New Jersey corporation which should "*buy*" all or most of these stocks; that the individuals agreed "to *exchange* their respective holdings" for the stock of the New Jersey Company and to use their influence "to the end that the New Jersey Company might become the sole *owner* of the whole, or at least a major portion, of the stock of both railroad companies;" that the Securities Companies was organized in accord-

ance with this plan, and that shortly after its organization it *acquired* a large majority of all the stock of the Northern Pacific Company, at the rate of $115 per share, *paying therefor* in its own stock at par," and at the same time *acquired* stock of the Great Northern Company, "*paying therefor* at the rate of $180 per share and using its own stock at par to make *the purchase;*" that the Securities Company made *further purchases* of Great Northern stock and soon had *acquired* such stock, amounting to about $95,000,000, using for that purpose its own stock to the amount of $171,000,000; and that "at the present time the Securities Company *is the owner* of about 96 per cent. of all the stock of the Northern Pacific Company and *the owner* of about 76 per cent. of all the stock of the Great Northern Company."

He then goes on to state the results of the scheme: "First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of *its ownership* of a large majority of the stock of both companies."

We come now to the opinions in this Court. The decree of affirmance is the forceful word of the Court. That decree is so clear and simple that there seems to be no possibility of any doubt to be solved by the opinions. But we submit that the opinions confirm our view of its meaning and effect. The opinions which give the reasons for the decision are, of course, those of Mr. Justice HARLAN and Mr. Justice BREWER. The dissenting opinions show why four of the Justices thought, not only that the Securities Company owned the stock, but that it should not have been restrained in the use of it. We find nothing in the opinion of Mr. Justice BREWER which bears upon the question in this case. It is the opinion of Mr. Justice HARLAN which alone calls for careful examination. It is in this opinion especially that counsel for the complainants think they find support for their contention that title to the stocks did

not pass to the Securities Company. They rely not upon any holding to this effect, but upon a word here, a phrase there and statements here and there by way of argument.

We take up the quotations from this opinion as they appear in the complainant's reply brief in the Circuit Court:

> "Prior to November 13, 1901, defendant Hill and associate stockholders of the Great Northern Railway Company and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company" (193 U. S., 321-2).

The quotation stops in the middle of the sentence. All that is wanted is the word "*holding.*" But to hold stock usually means to own it. Certainly it does not exclude the idea of ownership. Read the sentence through, however. It appears that to this company

> "*in exchange for* its own capital stock upon a *certain basis and at a certain rate*, was to be *turned over* the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as *the owner thereof* * * *."

And read the next sentences:

> "In this manner the interests of individual stockholders in the property and franchises of the two independent and competing railway companies were *to be converted into* an interest *in the property and franchises of the holding corporation.* Thus, 'by making the stockholders of each system *jointly interested* in both systems, and by practically *pooling* the earnings of both for the benefit

> of the *former* stockholders of each, and by *vesting* the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducements for competition between the two systems was to be removed, *a virtual consolidation effected*, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established.' "

The next quotation is :

> " In pursuance of this combination and to effect its objects, the defendant, the Northern Securities Company, was organized " (p. 322) ;

but what immediately follows is passed by. It appears that among the objects stated in the certificate were : " 1. To acquire by *purchase*, * * * any shares of capital stock * * * 3. To *purchase* * * * shares of the capital stock of any other corporation or corporations * * *."

And a little further on it is stated that Hill and associates and Morgan and associates *assigned* to the Securities Company stock of the two railway companies " upon an agreed *basis of exchange* of the capital stock of the Securities Company for each share of the capital stock of the other companies " (p. 324).

The next quotation is as follows :

> " In further pursuance of the combination, the Securities Company *acquired* * * * substantially all the capital stock of the Northern Pacific, Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company " (p. 324).

Looking behind the asterisks, we find the following:

> " additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, and, at the time of the bringing of this suit, *held, as owner and proprietor.*"

The next quotation was so dealt with as to be misleading. What appears in the opinion is as follows:

> " The Securities Company, *the bill also alleges* was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway Companies, but solely ' to incorporate the pooling of the stocks of said companies ' and carry into effect the above combination; that it is a mere depositary, custodian, holder or trustee of the stocks of the Great Northern and Northern Pacific Railway Companies; that its shares of stock are but beneficial certificates against said railroad stocks to designate the interest of the holders in the pool" (p. 324).

Mr. Justice HARLAN states only that all this is alleged in the bill. He found no such facts. And yet this paragraph—the language of the petition and not the language of Mr. Justice HARLAN—is the treasure house of words from which the complainants' counsel draw especially in their argument. Here they find the words " mere depositary," " custodian," " trustee," " beneficial certificates," etc. Two of these words are used in later quotations and we shall not overlook them. But it is hardly worth while to discuss their meaning at this point.

Possibly counsel felt justified in representing these statements taken from the petition as statements of facts found by Mr. Justice HARLAN, by the words following shortly after: " In our judgment, the evidence fully sustains the *material* allegations of the bill" (p. 325). But if so, we submit they were in error. Mr.

Justice HARLAN, after stating the nature of the suit and quoting the act of 1890 in full, says: "Let us see what are the facts disclosed by the record." Then for several pages facts as he found them are stated; and then in two paragraphs, one of which is that last quoted, he merely states that the "bill alleges" so and so. What he regarded as the *material* allegations is not otherwise shown than by what follows, being, in part, the next quotation in the reply brief in the Circuit Court:

> "Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation" (pp. 325–6).

And the next sentence:

> "The stockholders of these two competing companies *disappeared*, as such, for the moment, but

immediately reappeared as stockholders of the holding company * * *."

And a sentence a little further on, as follows:

"Those who *were* stockholders of the Great Northern and Northern Pacific and *became stockholders* in the holding Company are now interested in preventing all competition between the two lines, and *as owners of stock or of certificates of stock in the holding company*, they will see to it that no competition is tolerated" (p. 327).

Read also this, which almost immediately follows:

"The result of the combination is that all the earnings of the constituent companies make *a common fund* in the hands of the Northern Securities Company to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interest, but *upon the basis of the certificates of stock issued by the holding company.*"

And also the sentence a little further on:

"The Circuit Court was *undoubtedly right* when it said—all the Judges of that Court concurring—that the combination referred to 'led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, *by virtue of its ownership* of a large majority of the stock of both companies * * *" (p. 328).

We have now reached the end of that part of the opinion specially intended to show the facts; in which, rather than in the argument which follows, we should naturally look for the court's finding as to the title to the stock of the two railroad companies; and in the

light of which what is said *arguendo* should be read. It may be well to stop and summarize.

> The plan was to form a *holding* corporation, to which, *in exchange* for its stock at a certain rate, was to be *turned over* the stock of the two railway companies, the interests of stockholders in the two companies being *converted into* interests in the *property* and franchises of the holding corporation. In pursuance of the plan, the Securities Company was organized; Hill and associates and Morgan and associates *assigned* to it a controlling amount of the stock of the two companies upon an agreed basis *of exchange* for its stock; the company *acquired* additional stock of the two companies, issuing its stock therefor on such basis; and at the time of the bringing of the suit held as *owner and proprietor* substantially all the Great Northern stock and a controlling interest in the Northern Pacific stock. "Those who were stockholders" of the two railway companies had become "stockholders in the holding company." The control of the two roads had been placed "in the hands of a single person, to wit, the Securities Company, by virtue of its *ownership* of a large majority of the stock of both companies."

This we submit is a correct summary of Mr. Justice HARLAN'S statement of the facts of the case, full and complete so far as bearing upon the question at issue, except that we have not incorporated his words "or more properly speaking custodian," taking as more exact what he said before and after. We shall consider these words in connection with similar words later on in the opinion. The only straw in this summary for the complainants to catch at for support is the use of the phrase "holding corporation." This, alone by itself, would naturally mean a corporation holding stock in other companies, a stockholder in other companies; that is, having title to stock in

other companies. But it does not stand alone. Stock of the two railway companies was to be "*turned over*" to it in exchange for its stock. An *exchange* is a sale. What one turns over in exchange he parts with. What he receives in exchange becomes his, in consideration of what he has turned over. The stock was to be turned over "at a certain rate." This in itself negatives the idea of a mere deposit. No need of a rate or basis of exchange if title to what was "turned over" was to be retained. The interests of stockholders of the two companies were to be *converted into* interests in the property and franchises of the holding company. How "converted," if those who "turned over" their stock continued to own it? What *property* of the holding company were they to become interested in, if the stock to be turned over was not to become its property or assets? But what is the need of this careful study of words when it is said that when the suit was begun this company held the stock "as owner and proprietor", that those who were stockholders of the two companies had become stockholders of the holding company, that the company had control "by virtue of its *ownership* of a large majority of the stock of both companies"? Could language be clearer? And if there be found in the argumentative part of the opinion any words which seem to mean something else, must they not be construed into harmony with these clear statements of fact?

Passing on now to the argumentative part of the opinion, and dropping by the way the obvious suggestion that words must be read in the light of the context, we find the next quotation as follows:

> "In this connection, it is suggested that the contention of the Government is that the acquisition and *ownership* of stock in a state railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. * * * What the Government particularly com-

plains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a *common corporate trustee* designated to act for both companies in repressing free competition between them " (pp. 334–5).

The quotation should be supplemented by adding the next sentence, as follows:

" *Independently of any question of the mere ownership of stock* or of the organization of a state corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust Act? "

And, also, what is left behind the asterisks, as follows:

" This suggestion is made in different ways, sometimes in express words, at other times by implication. For instance, it is said that the question here is whether the power of Congress over interstate commerce extends to the regulation of the *ownership* of the stock in state railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Company can *acquire and hold stock* in other State corporations. Still further, it is asked, generally, whether the organization or *ownership* of railroads is not under the control of the States under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted and are very wide of the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the Government makes any such

> contentions or takes any such positions as those statements imply. It does not contend that Congress may control the *mere acquisition* or the *mere ownership* of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed."

We fail to see anything in these quotations to supply ammunition to the complainants, unless it be the use of the phrase "common corporate trustee," which will be considered in connection with a later quotation. Otherwise these quotations seem to show that the Judge at least did not mean to *deny* the ownership of the stock by the Securities Company, did not consider such a denial necessary to his argument.

The next quotation (p. 338) contains nothing pertinent to the present inquiry except the use of the word "hold," as to which we have already commented.

The next quotation (p. 343) is made for the phrase "the device of a holding corporation." It amounts to nothing for the present purpose, unless "holding" be given a new meaning.

In the next quotation the proceeding is spoken of as one to

> "prevent the Northern Securities Company from exercising the power it acquired in becoming the *holder* of the stocks" (pp. 344).

The same comment applies. It may be added, however, that here is a recognition of the *acquisition* of

the stock by which the power was acquired, and of the fact that the decree only affected the use of such power.

The next quotation (p. 344) is a statement of one of the contentions against the Government, quoted only for the word "holder."

The next is this:

> "The purpose of the combination was *concealed* under very general words that gave no clue whatever to the *real purposes* of those who brought about the organization of the Securities Company" (p. 345).

We do not know the purpose of this quotation.

The next quotation (p. 346) is made only for the words "holding corporation and trustee."

The next and perhaps the most important quotation in the view of the complainants is as follows:

> "It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing

> competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, 'Why put the stocks of both these (constituent companies) into one holding company?' He frankly answered: 'In the first place, this holding company was simply a question of custodian, because it had no other alliances.' That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies" (pp. 353-4).

In connection with this language, we consider the use of the words "or more properly speaking, custodian," on page 325, and the words "common corporate trustee," on page 334, and the words "holding corporation and trustee," on page 346.

Manifestly what the Judge sought here to bring out was, the singleness and continuity of the purpose back of the transactions mentioned up to the time when the stocks were turned over by the conspirators, so-called, and also the fact that behind this purpose stood all the time the same persons, the corporation, brought into existence by them, not being really a new party merely making an investment. A corporation is really an association of persons. The legal person said to be created by incorporation is not a reality. Until after the "conspirators" had carried out their agreement and other interests came in, they alone were the corporation. It *represented* them only. It was their "common corporate trustee" as every corporation is trustee for its stockholders; or the "custodian" of their in-

terests as stockholders. There was involved in this no investment by a new party. When the stocks received from the associates were turned over and stock of the new company issued therefor, the same persons in reality owned all the property jointly as had before owned in severalty the stocks of the railway companies. And so, he argued, the case was not one of an ordinary investment or purchase by a new party, but simply a pooling of interests by the so-called conspirators in accordance with the original purpose. In this sense the stock was put into the hands of the Securities Company "not as a *real* purchaser." It was not an *absolute* owner, because every corporation holds its assets in trust for its stockholders. And up to this point, as the Judge understood the facts, the stockholders of the new company were the very persons whose purpose he held to be condemned by the law; and so it represented the combination formed by those who had been stockholders of the constituent companies. He lifted the fiction of incorporation and found the same persons who had combined together and no others, in order to meet the argument that the law as applied would operate as an unwarrantable interference by Congress with the right of citizens to acquire property in accordance with State laws. There is nothing in all this contrary to the assertion that the Securities Company "obtained" or "acquired" (both words are used in the paragraph) these stocks, that what it held it owned as fully as a corporation can own property, that these stocks became its assets, that the stockholders of the two railway companies were *converted into* stockholders of the Securities Company, that these stocks were "pooled" in the hands of this Company through its ownership of them, that the interests of the stockholders of the railway companies were irrevocably "turned over" and what these persons thereafter had were interests in the *property and franchises* of the Securities Company *as its stockholders.*

Are we to suppose that this language, used in argu-

ment, is intended to contradict what is said in the preceding statement of facts? After writing this paragraph should Mr. Justice HARLAN have turned back and completely changed that statement, especially where he assents to the finding of the Circuit Court that control of the two roads was in the hands of the Securities Company, "by virtue of *its ownership* of a large majority of the stocks of both Companies"?

Immediately after this, Mr. Justice HARLAN recites the decree below, not omitting the adjudication that the stock "was acquired and is now held" by the Securities Company, and says that "no valid objection can be made to the decree below, *in form or in substance.*"

He goes on to say that if there was such a combination as was found, the Court "could prohibit the parties to the combination from *doing the specific acts* which being done would effect the results denounced by the Act;" recognizing that the decree merely restrained the Securities Company from *doing specific acts* through the *use* of its stock, and did not affect the title to the stock or the power of the Company to dispose of it as its assets.

A little further on, in answer to the suggestion, that no relief could be granted because the combination had already accomplished its object, Mr. Justice HARLAN (evidently with approval) quotes from the opinion below as follows:

> "Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust Act to hold that after an unlawful combination is formed and *has acquired* the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding *to use it* and execute the purpose for which the combination was formed, it must be left in possession of the power it has acquired, *with full freedom to exercise it.* * * *"

The power has been acquired, the stock is owned; but *the use* of the stock, the *exercise of* the power may be restrained.

When immediately after this quotation Mr. Justice HARLAN says: "The Circuit Court has done only what *the actual situation* demanded" does he not clearly recognize that the decree affects not the ownership of the stock, but merely its use in restraint of commerce? The "*actual situation*" was, that the control of the two roads *had been placed* "in the hands of a single person, to wit, the Securities Company, by virtue of *its ownership* of a large majority of the stock of both companies." Clearly Mr. Justice HARLAN understood the effect of the decree to be limited as explained in the later opinion of the Circuit Court upon the application for intervention, that that decree merely "rendered the stock of the two Railway Companies, *so long as it remained in the hands of the Securities Company*, valueless for the purpose of carrying out the objects of the unlawful combination;" that it only affected the use of the stock; did not affect its ownership; did not affect the disposition of it, save that "the situation that had been created by the decree," because of the restraint put upon the owner in its use, would force that owner, the Securities Company, to somehow dispose of it; to dispose of it in such manner as might be determined by the directors and stockholders of that Company.

Almost immediately after the last quoted sentence of the opinion and in the same line of argument, Mr. Justice HARLAN says—and this quotation is relied upon by the complainants—as follows:

> "The decree, if executed, will destroy, not *the property interests* of the original stockholders of the constituent companies, but *the power* of the holding corporation as the instrument of an illegal combination of which it was the master spirit, *to do that* which, if done, would restrain interstate and international commerce. The *exercise of that*

> *power being restrained*, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose" (pp. 357, 358).

This, it seems to us, confirms our understanding of the opinion. The decree does not affect property interests, but simply restrains *the exercise in restraint of commerce of the power* which had been acquired. The stocks which the Securities Company owns are not affected, nothing is taken from the value of such stocks for legitimate uses, the assets of the company are not depleted, the property interests of its stockholders are not impaired. Any peculiar value attaching to the stock in the hands of the Securities Company, dependent upon its use to restrain commerce, is illegitimate; that peculiar value is destroyed, but the legitimate value of the stocks is in no way affected. Nothing has been done which takes away from these stocks as assets any element of value which they had in the hands of those who sold them to the Securities Company.

But counsel for the complainants, here again catching at a single phrase, and disregarding the context, claim support for their contention in the words "the property interests of the *original stockholders of the constituent companies*." The argument to which this paragraph of the opinion was addressed, was, that while the jurisdiction of the Court was only to *prevent* violations of the Act, this decree operated to undo what had been done. In a general way the answer is that the decree does not undo what has been done—does not affect any vested rights. By "original stockholders of the constituent companies" the Judge evidently meant "those who were stockholders of the Great Northern and Northern Pacific and *became stockholders* in the holding company." These were the only persons whom he had in mind as stockholders of the Securities Company. There is nothing to indicate that he realized that any stock had been

issued by the Securities Company otherwise than in exchange for stocks of the "constituent companies;" and the phrase described the body of the persons whose doings alone he had been considering. Surely he did not mean to imply anything contrary to his previous statement of the facts; he did not mean to imply that there was no stock and were no stockholders of the Securities Company, that the property interests of the "original stockholders" in the constituent companies had not been converted into interests in the Securities Company, that there had been no exchange but only deposits of stock under a voting trust, that the depositors and their assigns now own in severalty what the depositors severally deposited, and that the stocks of the constituent companies are not assets of the Securities Company to be disposed of as the directors and stockholders of that Company may determine.

We submit that there is no support for the theory that it is the effect of the decree that the Securities Company never got title to these stocks.

II.

It does not follow as matter of law, from the facts shown by the record, including the decree, that title to these stocks did not pass to the Securities Company.

The second amended bill brings in as facts the facts which were found in the Government suit and upon which the decree therein was made, or some of them, so as to permit the complainants to rely not simply upon the decree as *res adjudicata* (it having been objected that they were not parties to that suit), but upon the facts there found and the fact of the decree

and, by way of authority, upon the decision therein made upon such facts.

We assume that all such facts sufficiently appeared for the purposes of the order appealed from. This assumption, however, has no application to whatever the complainants meant in paragraph V. by the words as follows :

> " and that said holding company should act as custodian, depositary or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns,"

nor to the similar words following, nor to the phrases in paragraphs VI. and VII. in conformity therewith. Read in connection with what precedes, these words cannot be taken as meaning what the complainants' counsel would make them mean for purposes of argument. But if they be deemed to have such meaning, they are supported by no evidence—merely the general verification of Cornish and Pierce as to their belief, and are inconsistent with what is stated in the original and first amended bill and in the second amended bill itself. From the record in the Government suit and the proofs in this case, they clearly appear to be untrue. The insertion of these words is a manifest effort to make a basis of facts to fit the few words in Mr. Justice HARLAN'S opinion, which are really the sole ground of the complainants' contention. It is an attempt to turn argument into allegation, and protect it by a general verification. No Judge has doubted—no one can doubt—that in the plan condemned as unlawful it was *intended* that the Securities Company should become the owner of the stocks " acquired " by it, and that it did and does own these stocks, if it was possible in law to bring about this result. Let the complainants have the benefit of all *facts* in arguing that the effect of the decree in the Government suit is to make what was intended, what the complainants and everybody else

supposed had been done, a nullity in the eye of the law. But surely they cannot claim that they have foreclosed argument by these loose allegations, unsupported by evidence and refuted by the whole record.

For the facts found in the Government suit reference is made to the summary of Judge THAYER'S statement of facts (*ante*, p.), and to the summary of Mr. Justice HARLAN'S statement (*ante*, p.).

We accept the decree as determining, for the purposes of this appeal, the illegality of the combination.

As to the transaction in which the Oregon Short Line Railway Company parted with the stock it seeks to recover, let us see what is the case made by the bill itself, after throwing out or altering such allegations as are proved incorrect by the evidence of Mr. Harriman himself. The bill limits the complainants, at least. A cause of action for the recovery of the stock must be found *within the allegations*, or else there can be no injunction *pendente lite* (Leo vs. Union Pacific Ry. Co., 17 Fed., 273). On the other hand, so far as the allegations are disproved, or, rather, so far as they do not *appear* to be true, they are as if they were not for the purposes of this appeal.

Paragraphs I. and II. only show citizenship of the parties with a view to jurisdiction. It may be noted, however, that it is alleged that the Securities Company "is a corporation organized and existing by virtue of the laws of the State of New Jersey." Here, at least, is something done under the illegal plan which is not null and void.

Paragraph III. tells about the stock of the two Railway Companies issued and outstanding. What is said about the conversion of common stock of the Northern Pacific into preferred stock is shown by record evidence to be untrue (Record, p. 305 *et. seq.)*

Paragraph IV. shows that the two railways were and are substantially parallel and competing.

Paragraph V. alleges that the Securities Company was organized November 13th, 1901, by filing a certificate under the New Jersey law. As the certificate is

attached, the statement as to its contents is of no interest.

Then come allegations as to the plan. It is said that the company was organized in pursuance of a combination in restraint of trade, &c. This is largely conclusion of law. What follows the words "*that is to say*" shows what it is meant to allege *as facts.* It is there said that prior to November 13th, 1901, Hill, Morgan and others (not including any of the complainants) owning or controlling a majority of the stock of the Great Northern Railway Company and a majority of the *common* stock of the Northern Pacific Railway Company agreed among themselves, not with the complainants, "to organize a holding company * * * and that said holding company should *acquire and permanently hold* a majority of the shares of the capital stock" of the two railway companies "and *control the operation and management thereof in perpetuity,* and that the then existing holders of such railway shares should *deposit* the same with said holding company and *receive in lieu thereof* share certificates of the said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that said holding company should act as *custodian, depositary or trustee* of said railway shares on behalf of the existing stockholders of said railway companies and their assigns."

If there were nothing but this to tell what happened before the organization of the Securities Company, what should we naturally understand? The company to be organized was to "*acquire* the stocks" and "*permanently hold*" them. This means ownership, through which the company could control the two companies in perpetuity. "The then existing holders" (that is, of course, owners) should *deposit* their shares. "Deposit" evidently means "deposit so as to transfer title." This is made entirely clear by what follows: "and *receive in lieu thereof* share certificates of the said holding company." If this does not mean an exchange,

what can it mean? "In exchange" is used as equivalent later in the bill several times. They are to receive $180 and $115 per share, respectively, in stock of the new company. The new company, of course, could not issue stock except for money's worth. Clearly then, the stock deposited is to become the property of the company *acquiring* it by the issue of its stock. Even upon demurrer it would be held to be here alleged, that Hill, Morgan and others agreed among themselves that the new company should become the absolute owner of the stocks referred to. But what of the allegation that it was part of the agreement that the new company should act as "custodian, depositary *or* trustee" of said shares, etc.? Every corporation is a custodian or trustee for its shareholders and "the existing stockholders of said railway companies" were to become stockholders of the Securities Company. Upon demurrer the court would disregard this allegation as not stating a fact, being a mere legal characterization, which like adjectives, epithets, etc., are of no force in stating a cause of action. The evidence, especially that of Harriman, shows that the plan undoubtedly contemplated absolute ownership of the railway stocks by the Securities Company. That this was the plan as found in the Government suit, see Point I.

Next follows this: "Thereupon, in pursuance of said agreement, said Northern Securities Company was organized * * * and forthwith agreed to *acquire and hold* the shares of said railway stocks as aforesaid, as custodian, depositary or trustee, and to issue *in exchange therefor* its own share certificates *upon said agreed basis.*" Would not this be treated as nothing upon demurrer? Agreed with whom? It is not said. Certainly not with any of the complainants. Up to this point they have not come into the case stated. Does it mean that it agreed with the existing stockholders of the railway companies represented by Hill, Morgan and others? If so, what rights can the com-

plainants base thereon? But in any event, with whomsoever the new company agreed, it only agreed to purchase the railway stocks at $180 and $115 respectively by the issue of its own stock "in exchange therefor." The agreement necessarily involved its becoming owner of the stocks received in exchange. Being such owner, it would hold the same, whether it so agreed or not, as trustee for all its stockholders. Counsel, we presume, will not seriously assert that the company agreed in terms as stated. This averment was evidently made to fit a theory, not to state a fact. The evidence as against any limitation of ownership is full and there is no evidence to the contrary. Ownership unlimited, except as ownership by corporations is in a sense always limited, was found in the Government suit. See Point 1.

We must not overlook the use of the words "*permanent*" and "*in perpetuity.*" Undoubtedly it was the expectation of Hill, Morgan and others that the Company would permanently hold the stocks and permanently or in perpetuity control, that is, elect the directors of, the two railway companies. But the method adopted with this expectation was vesting in the Company the ownership of the railway stocks, absolute and unconditional.

Up to this point the bill has dealt only with what Hill, Morgan and others planned before the Securities Company acquired any of the stock.

Paragraph VI. shows that the Securities Company issued more than $387,000,000 of its stock to holders of railway stocks "in exchange for" such stocks (which were put in the names of its agents) and issued further stock for cash.

It is alleged that the issue of its stock was "in pursuance of said agreement" and that it was "for the purpose and with the intention of effectuating the scheme or combination above alleged and to enable the Northern Securities Company, as such holding corporation, to hold a majority of the shares of the said railway companies and control the operation and man-

agement of the same." If this means, that until the Securities Company got a majority of the stock of the two railway companies, the purpose of its purchases was to get such majority, well and good. But the bill itself shows that before the company was formed Hill, Morgan and others controlled a majority of each of those stocks, the Northern Pacific preferred stock omitted because it was to be redeemed. This could not have been the purpose of any further purchases. It could not have been the purpose of the purchase of the minority holdings of the complainants.

The remaining allegation of this paragraph is to the effect that all to whom stock of the Securities Company was issued knew of the purposes for which the Company was organized and of the fact that a majority of the stock of each of said railway companies was to be or had been deposited with the Securities Company as custodian or depositary in pursuance of said agreement. This is one of those general allegations which can hardly stand alone. It is unsupported by any proof. But it is not important for our present purpose, except as it includes Harriman and the Oregon Short Line Railroad Company.

Down to this point nothing has been said of the transaction which is the subject of this suit, namely, that in which the complainants parted with the stock which they now seek to recover. This transaction is first spoken of in paragraph VII. It is therein shown that the Oregon Short Line Railroad Company held $37,023,000 common stock and $41,085,000 preferred stock of the Northern Pacific Railway Company. The preferred stock, it is not disputed, was subject to redemption; and, before this transaction, had been called for redemption. The common stock held by the Oregon Short Line Railroad Company was a minority holding, the bill itself showing that a majority of the common stock was controlled by Hill, Morgan and others. In this situation the bill alleges that the Oregon Short Line Railroad Company and Harriman

and Pierce, in whose names the stock stood, agreed with the promoters and incorporators of the Securities Company (it is not shown who they were) " to *transfer* and deposit with said Northern Securities Company *under the terms and conditions aforesaid* the said shares of the Northern Pacific Railway Company ", preferred and common, and "*receive in exchange* therefor certificates of said Northern Securities Company *representing an interest therein of* $82,491,871, par value, and $8,915,629 in cash." This is not yet the transaction with which we are here concerned, but only a preliminary agreement with persons not named. From the affidavit of Mr. Harriman in this case (Record, p. 158) it appears that whatever agreement (apparently mere negotiation) there was before the exchange was with Morgan & Co. From that affidavit and other testimony of Mr. Harriman it is clear that there was nothing in fact for the words "*under the terms and conditions aforesaid*" to fit ; there were no terms or conditions other than as stated. It was simply agreed or proposed that the railway stocks be turned over and the Securities Company stock and cash be received in exchange therefor (Record, pp. 158, 199).

Finally we come to the actual transaction—the only transaction with which this case is concerned directly —and this is told in the following words :

> " Harriman and Pierce, acting for your orator, the Oregon Short Line Railroad Company, did on or about the 18th day of November, 1901, *transfer and deliver* to said Northern Securities Company certificates for $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of said Northern Pacific Railway Company owned by your said orator as aforesaid and *received in exchange* therefor certificates of said Northern Securities Company *representing an interest of* $82,491,871 par value *and said cash*, that is, $8,915,629."

That was the transaction—a mere transfer and delivery of the railway stocks for Securities Company stock and cash. That was the only transaction which the complainants or any of them had with the Northern Securities Company. It was completely closed—not an agreement to sell but a sale, involving no executory agreement whatever. The title to the railway stocks passed to the Securities Company, the stock of the Securities Company and the cash was delivered and paid therefor. There was no concurrent agreement, no condition of any kind; no provision whatever for the doing of anything further, save that the certificates of stock evidenced the ordinary rights of stockholders in all the property of the Securities Company.

The allegation in paragraph IX., to the effect that it was agreed between Harriman and Pierce and the Securities Company that the preferred stock should be converted into common stock, is shown to be untrue by the record of the action of the Northern Pacific Company, in which Mr. Harriman participated (see record, page 284).

At the end of paragraph VII. is this allegation :

> "The exchange aforesaid was made by your said orators in good faith, in the belief that the organization of said Securities Company was not, and the acquisition and holding by it of said railway stocks as aforesaid would not be, in violation of any statute of the United States."

Why this belief? Was it not chiefly, if not entirely, because these gentlemen knew that simply outright and unconditional purchases of stock were involved, because they thought that the Anti-Trust Act could not affect rights acquired by such purchases, in accordance with the views of Judge JACKSON in *In Re Green*, 52 Fed. Rep., 104, and of four of the justices of this Court? That the Securities Company should buy and own the stocks was the substance of the plan.

That it had done so, absolutely and unconditionally, was the chief, if not the only, ground of confidence in the legality of what had been accomplished.

The findings in the Government suit, the affidavit of Mr. Harriman herein, the testimony of Mr. Harriman and others in the Government suit and in the suit of the State of Minnesota against the Securities Company, the original bill herein, the first amended bill herein, and even the second amended bill herein, properly read, and also the necessities of the situation, all without a dissentient voice, prove that the transaction between the Oregon Short Line Railroad Company and the Northern Securities Company was an absolute, unlimited, unconditional, completed sale to the Northern Securities Company of the Northern Pacific stock, for which the Securities Company issued its stock to the amount of over $82,000,000 and paid nearly $9,000,000 in cash. In other words, the stock herein sought was sold and transferred to the Securities Company in exchange for its stock and for cash, unless what everybody intended, and what everybody supposed had been done, is to be treated as not done because of the law.

(See Affidavit of Harriman *in this suit*, Record, pp. 155 to 160; Testimony of Harriman before Interstate Commerce Com., Record, pp. 199, 208, 209, 210, 213; Testimony of Harriman in Minn. v. No. Sec. Co., Record, pp. 233 to 235; Minutes of Northern Securities Directors' Meetings, Record, pp. 305, 300, 309, 310, 311, 312.)

We insist, first, that in the Government suit it was adjudicated that this transfer was not null and void. It was there adjudged that the stock "*was acquired and is now held*" by the Securities Company; and if there would otherwise be any doubt as to the meaning of these words, it is made clear by the opinions, including that of Mr. Justice HARLAN, that they meant that the title to the stocks was acquired and is held by this Company (see Point I.).

If this is not *res adjudicata*, in the strict sense, be-

cause the complainants were not parties to that suit, it is controlling authority, the facts as now shown being as therein found.

Argument can proceed no further except by assuming that the decree in that suit did not mean what it said. And in what it did, aside from using the words quoted, the decree assumed and in effect declared the ownership of the stocks to be in the Securities Company.

But let us assume that we are wrong in this; and that the decree has no bearing in the case except as deciding that the combination was illegal. Upon that assumption, does it follow that *the transaction in which the Oregon Short Line Railroad Company parted with its stock* was void and no title passed to the Securities Company?

Two reasons are suggested by complainants for so claiming:

(1) That the transaction was illegal.

(2) That it was *ultra vires.*

A.

That transaction was not void because illegal.

That transaction was not illegal. It was not found in the Government suit to be in violation of the Anti-Trust Act. The combination formed by Hill, Morgan and others was found to be illegal, and it was held that the Securities Company became a participant therein upon its organization. But it was not held that its purchase of stocks from the Oregon Short Line Railroad Company was in violation of that Act.

It appears that the sale of these stocks to the Securities Company did not aid in the accomplishment of the purpose which was condemned. The bill states that prior to this transaction Hill, Morgan and others controlled a majority of the common stock of the Northern Pacific Company. It is undisputed that the preferred stock had before this transaction been called for redemption, and also that the right to take the con-

vertible bonds exchangeable for new stock was given proportionally to the holders of the common stock. It is manifest, therefore, that the purpose of the combination to vest control of the two railroad companies in the Securities Company was accomplished, or its accomplishment secured, before the transaction under consideration. The purchase of the Oregon Short Line holdings in no way aided this purpose.

But if it be assumed that that transaction was in itself illegal under the Anti-Trust Act, it does not follow that it was void.

Whether a transaction prohibited is therefore void, so that no right can accrue through it, or not, depends upon the legislative intent. To forbid that a thing be done, is not necessarily to declare that if done it shall be void in law.

> "The statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so."
>
> Harris vs. Runnels, 12 How., 79.

In that case the penalty clause of the statute, imposing a fine upon buyer and seller, was taken by the Court as indicating that the Legislature did not intend to declare the contract void.

In *Gold Mining Co. vs. Natl. Bank*, 96 U. S., 641, a suit by a National Bank to recover a balance of overdraft, the court rejected a defense based on the fact that the amount of the debt exceeded one-tenth of the paid-in capital of the Bank, in violation of the prohibition of Section 5200 of the Revised Statutes, citing *Runnels vs. Harris.*

In *National Bank vs. Mathews*, 98 U. S., 621, and in *National Bank vs. Whitney*, 103 U. S., 99, mortgages were held valid although the transaction in which the mortgages were taken was prohibited. And these cases were approved in Logan County Bank vs. Townsend, 139 U. S., 67, 76. Thompson vs.

St. Nicholas Nat. Bank, 146 U. S., 240, 251 and in Scott vs. Deweese, 181 U. S., 202, 211.

See, also,

Burck vs. Taylor, 152 U. S., 634, 648.
Frits vs. Palmer, 132 U. S., 282,
McBroom vs. Scottish Investment Co., 153 U. S., 318.
Jarvis Trust Company vs. Willhoit, 84 Fed., 514.
Central Trust Co. vs. Columbus Ry. Co., 87 Fed., 815.
Scott vs. Deweese, 181 U. S., 202.
Sioux City Terminal Co. vs. Trust Co., 82 Fed., 134.
Chattanooga S. R. Co. vs. Evans, 66 Fed., 809, 815.

Section 1 of the Anti-Trust Act declares every contract, combination or conspiracy therein described illegal, but immediately goes on to prescribe the penalty for making such a contract or engaging in such a combination or conspiracy, the penalty being fine or imprisonment or both. Section 2 prescribes a like penalty for monopolizing, etc. Section 3 is like Section 1, except that it relates to trade or commerce in a territory or the District of Columbia. Sections 4 and 5 give special jurisdiction to *prevent* violations of the Act. Section 6 reads: "*Any property owned* under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in Section one of this Act, and being in course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States and may be seized * * * ." Section 7 gives a right of action for three-fold damages to any person injured by reason of anything here forbidden or declared to be unlawful.

Here, then, is an unusually full specification of penalties for violation of the Act; and in terms it recognizes that *property may be owned* under a contract or combination or pursuant to a conspiracy therein declared to be illegal. The specification of penalties and

the recognition of rights which may be acquired bars the inference that Congress intended that a contract forbidden by the Act should be made void.

Moreover such an inference is barred by the fact that the power of Congress to make void such transactions as the one in suit is at best doubtful. It is not necessary to establish the lack of power, but that the power is doubtful cannot be disputed in the light of the opinion of Judge JACKSON *in re* Greene (52 Fed., 104) and the opinion of Mr. Justice WHITE in the Government suit.

B.

The transaction was not void because ultra vires.

It was within the power of the Company, according to the language of the certificate, and was expressly authorized by the New Jersey law. Section 51 provides: "Any corporation may purchase * * * the shares of the capital stock of * * * any other corporation or corporations of this or any other state * * *."

Whether an act of a corporation is *ultra vires* or not, is determined by the law of the state which created it. No other state or sovereignty can enlarge or limit the corporate powers or capacity. It may forbid the corporation from doing some or even any acts within its jurisdiction; transactions so forbidden will be illegal, but not *ultra vires*. Corporations, like natural persons, are subject to the laws which operate generally upon persons. If they violate such laws, their action is illegal, perhaps criminal, but it is not *ultra vires*, if it is within the power given it by its charter. The violation of a Federal Statute by a state corporation does not make a case of *ultra vires*.

But even if the transaction were *ultra vires*, it would not for this reason be void.

The decisions of the Supreme Court of the United States in *Central Transportation Company vs. Pullman Car Co.*, 139 U. S., 24, and other cases, to the effect

that contracts *ultra vires* are void, are relied upon by the complainants. We insist that they have no application. The Securities Company is a new Jersey corporation. The effect of its acts as a corporation is to be determined by the law of New Jersey.

The law of New Jersey as declared by its Courts, is that an executed *ultra vires* transaction is not void.

> *Camden & Atlantic R. R. Co. vs. May's Landing, etc., R. R. Co.*, 48 N. J. L., 530, 567.

The New Jersey corporation law, as to its meaning and effect, is peculiarly a matter determinable by the New Jersey Courts.

The decision of Vice Chancellor BERGEN in the Continental Securities Company case (Record, p. 257) is in itself sufficient authority.

Were there any doubt as to the proposition that, with respect to the *ultra vires* transactions of a corporation, the law of the domicile is controlling, it must certainly be true that either the law of the domicile or the law of the place of the transaction controls. The place of the transaction in this case was New York, and the New York law is to the same effect as that of New Jersey—that an executed *ultra vires* transaction stands as valid.

> *Whitney Arms Co. vs. Barlow*, 63 N. Y., 62.
> *Woodruff vs. Erie Ry. Co.*, 93 N. Y., 609.
> *Rider Life Raft Co. vs. Roach*, 97 N. Y., 378.
> *Bath Gas Light Co. vs. Claffy*, 151 N. Y., 24.
> *Vought vs. Eastern Bdg. &c., Assoc.*, 172 N. Y., 508.

But even in the Federal courts, with respect to the passing of title, the law is the same. In the National Bank cases above referred to, the transactions were expressly prohibited, but the prohibitions were in the statute under which the corporations were formed. Hence, the transactions were *ultra vires* as well. Yet the contracts, being executed on the one part, were enforced upon the other.

III.

Even if the transaction in which the Oregon Short Line Railroad Company parted with the stock were void because illegal or ultra vires, nevertheless the complainants could not recover.

In *Equitable Life Assurance Society vs. Wetherill*, 127 Fed. Rep., 947, 949, the court says:

> "It is claimed by the plaintiff in error that the contract testified to by Wetherill was in violation of this enactment, and therefore illegal *and void*. It is sufficient answer to this point to say that the law does not help those, who have made an illegal contract, to recover back the money paid in pursuance thereof, but leaves them where it finds them. The contract was executed."

Though it be assumed that the intention of the Anti-Trust Act was as if it had said that transactions in violation of it should be void, yet the complainants could not recover.

> "The transaction being illegal the law leaves the parties to suffer the consequences of their illegal acts. * * * When, then, it is said that the contract is void, the language is used with reference to the question whether there is any legal remedy upon it."
>
> *Smith vs. Bean, 15 N. H., 577.*

> "Upon this principle possession acquired from an illegal transaction, or by a contract fully executed, will often avail the party holding it *as a sufficient title.* Neither party is allowed to impeach its validity by asserting the illegality of his own act. * * * The court does not give it effect, but simply refuses its aid to undo what the parties have already done."
>
> *Myers vs. Meinrath, 101 Mass., 366.*

"He (the vendor) could only impeach a sale by showing the illegality of his own acts, which in the case of an executed and completed contract he certainly cannot do. This disability on his part to reclaim it would *avail the party holding it as a sufficient title.*"

See, also,

St. L., Vandalia T. H. R. R. Co. vs. T. H. & C. R. R. Co., 145 U. S., 393.
Higgins vs. McCrea, 116 U. S., 671.
White vs. Barber, 123 U. S., 392.
Horton vs. Buffington, 105 Mass., 399.

It is unnecessary to consider whether there is any different rule in this respect in relation to transactions merely *ultra vires*. There is, we think, no question of *ultra vires* in this case. The suggestion is that the transaction was *ultra vires*, because illegal under the Anti-Trust Act. If illegality is involved, even though the transaction be also *ultra vires*, the rule applies. The vendor is not permitted to make a claim based upon the illegality of his own act.

The Vandalia case *(supra)* was one of *ultra vires*.

That the transaction, being as heretofore shown, was completely executed, is beyond dispute.

It is also beyond dispute that that transaction has never been abandoned. The Securities Company claims the ownership which was thus acquired and proposes to exercise the rights of such ownership by distributing the stocks as surplus assets among its stockholders.

LASTLY.

The decree of the Circuit Court of Appeals should be affirmed, the injunction order reversed, and the bill dismissed.

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